

No. 359

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ALBERT E. GRAY,

Plaintiff in Error,

vs.

S. Prentiss Smith, Frank Miller
and William P. Harrington,
Executors of the Last Will
and Testament of Edgar
Mills, Deceased,

Defendants in Error.

TRANSCRIPT OF RECORD.

In Error to the Circuit Court of the United States,
for the Ninth Judicial Circuit, in and for the
Northern District of California.

FILED

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*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

ALBERT E. GRAY,

Plaintiff,

vs.

S. PRENTISS SMITH *et als.*,

Defendants.

**Statement under Amendment to Section 7 of
Rule 23, Adopted February 17th, 1896.**

A. E. Gray, the plaintiff in error, herewith files a statement of the errors in which he intends to rely in the above entitled action, and of the parts of the record which he thinks necessary for the consideration thereof.

STATEMENT OF ERRORS.

1—The Court erred in deciding that the plaintiff did not at any time have the means or ability to pay Joseph A. Donohoe, Sr., the purchase price demanded by him for the Market Street lot.

2—The Court erred in giving judgment against the plaintiff and for the defendants for their costs, because Edgar Mills, having refused to take the title of said Market Street lot, and having given notice to plaintiff, that, because of such alleged defect in title, he refused

to carry out his contract for the purchase from the plaintiff of said Market Street lot, became and was liable to the plaintiff for such breach of his contract without regard to plaintiff's ability to pay said Donohoe the purchase price demanded by him for said Market Street lot.

3—The Court erred in giving judgment against the plaintiff and for the defendants for their costs.

PARTS OF THE RECORD DESIRED TO BE PRINTED.

Fourth Amended Complaint. (Pages 1 to 11 inclusive.)

Answer to the Fourth Amended Complaint. (Pages 18 to 28 inclusive.)

Findings. (Pages 29 to 44 inclusive.)

Bill of Exceptions, omitting therefrom the findings, which are set forth in the transcript of the record commencing on line 12, page 70, and ending on line 8, page 85, and inserting in lieu of the findings so omitted, after the word "following," on line 12, page 70, the words ("Here follows true copy of findings"). Then add without setting out copy of same—Petition for writ of error, filed, etc. Bond approved, filed, etc. Writ of Error and Answer thereto, filed, etc. Citation, filed, etc.

March 19, 1897.

VINCENT NEALE,
SIDNEY V. SMITH,
Attorneys for Plaintiff in Error.

[Endorsed:] Service admitted, March 19, 1897.
Denson & DeHaven.

Filed March 19, 1897. F. D. Monckton, Clerk.

*In the Circuit Court of the United States, Northern
District of California, Ninth Circuit.*

ALBERT E. GRAY,

Plaintiff,

vs.

S. PRENTISS SMITH, FRANK
MILLER, and WILLIAM P.
HARRINGTON, Executors of
the last Will and Testament of
Edgar Mills, Deceased,

Defendants.

Fourth Amended Complaint.

Albert E. Gray, a subject of Victoria, Queen of Great Britain and Ireland, and Empress of India, an alien, by this his fourth amended complaint, complains of S. Prentiss Smith, Frank Miller and William P. Harrington, Executors of the last will and testament of Edgar Mills, deceased, all of said defendants being residents and citizens of the State of California, and thereupon plaintiff alleges and avers the citizenship and residence of the parties herein as hereinabove set forth.

II.

That on or about the 7th day of October, 1891, the plaintiff and said Edgar Mills, who was during his life-

time a resident and citizen of the State of California, entered into mutual written agreements signed by both of them, wherein and whereby the plaintiff agreed to sell and convey to said Edgar Mills by a good and sufficient deed free of all incumbrances, and the said Edgar Mills agreed to buy from plaintiff the following lot of land, situate in the City and County of San Francisco, State of California :

Commencing at a point in the southeasterly line of Market Street distant thereon two hundred and seventy-five (275) feet northeasterly from the point of intersection of the northeasterly line of Eighth Street, formerly Price Street, with the said southeasterly line of Market Street ; thence northeasterly along the last mentioned line eighty-two feet and six inches ; thence southeasterly and parallel with Eighth Street one hundred and sixty-five (165) feet to the northeasterly line of Stevenson Street ; thence southwesterly along the last mentioned line eighty-two (82) feet and six (6) inches, and thence northwesterly one hundred and sixty-five feet (165) to the place of beginning, being a subdivision of lot No. 264 of the 100 vara survey, according to map of W. M. Eddy, on file in the office of the County Recorder of said City and County, which is hereinafter styled the Market Street lot ; and the said Edgar Mills agreed to pay to the plaintiff as and for the consideration for said Market Street lot the sum of one hundred and twenty thousand dollars (\$120,000) in cash, and in addition to convey to the plaintiff in fee free from all incumbrances, certain tracts of land situate in Colusa and Tehama

Counties, State of California, aggregating 8421 acres and briefly known and described as the Eureka Ranch, containing 2400 acres, and Mills' lands at Sites, containing 3281½ acres, both situate in Colusa County, also the Ehorn Ranch consisting of 1060 acres of land belonging to said Edgar Mills, and 400 acres close adjoining the Town of Kirkwood, and 1280 acres belonging to said Edgar Mills a few miles west of the Town of Kirkwood, all situate in Tehama County.

That on said 7th day of October, 1891, the 400 acres of land belonging to the said Edgar Mills close adjoining the Town of Kirkwood, were more particularly described by legal subdivisions as follows :

The south half of the south half of Section 14, and the N. E. ¼ of Section 23, in Township 23 North, Range 3 West, M. D. B. & M., and on said 7th day of October, 1891, the said Edgar Mills did own the above lastly described lands, and did not own any other lands close adjoining the Town of Kirkwood.

That on said 7th day of October, 1891, the 1280 acres of land belonging to the said Edgar Mills, situate a few miles west of the Town of Kirkwood, were more particularly described by legal subdivisions as follows :

All Section 16, and all Section 17, in Township 23 North, Range 3 West, M. D. B. & M., and on said 7th day of October, 1891, the said Edgar Mills did own the above lastly described lands, and did not own any other lands situate a few miles west of the Town of Kirkwood.

That on said 7th day of October, 1891, the said Ehorn

Ranch consisted of the following lands more particularly described by legal subdivisions as follows :

All Section 25, the east half of the east half, and the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Section 26, and that portion of said Section 26 beginning at the quarter section corner of the southern boundary line of Section 26 ; thence running due north 20 chains ; thence due east 20 chains ; thence north 60 chains to the northern boundary line of said Section 26 ; thence west along said section line to the intersection of said lands with the line of the Northern railway ; thence southerly along the line of said railway to the intersection of the line of said railway with the southern boundary line of said Section 26 ; thence east along the southern boundary line of said section to the place of beginning ; all of said lands hereinbefore described as constituting part of the Ehorn Ranch being situate in Township 23 North, Range 3 West, M. D. B. & M.

Also in Township 23 North, Range 2 West, M. D. B. & M., lots 1 and 2 of the N. W. $\frac{1}{4}$, and lots 3, 4 and 5 of the S. W. $\frac{1}{4}$ of Section 30 ; all of said lands hereinbefore described, situate in Sections 25 and 26 of Township 23 North, Range 3 West, and in Section 30 of Township 23 North, Range 2 West, constituting the Ehorn Ranch.

That on said 7th day of October, 1891, the said Edgar Mills did own the above lastly described lands, and did not own any other lands designated or known as the Ehorn Ranch.

That on said 7th day of October, 1891, the said Edgar Mills owned certain lands at Sites containing $3281\frac{1}{2}$

acres, more particularly described by legal subdivisions as follows :

In Township 17 North, Range 5 West, M. D. B. & M., all Section 1 ; the east half of the east half of Section 2 ; the east half, and the east half of the west half of Section 12 ; the west half, the S. E. $\frac{1}{4}$, the west half of the N. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Section 10 ; the west half, and the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Section 14 ; all Section 15 ; the N. E. $\frac{1}{4}$ of Section 22 ; the N. W. $\frac{1}{4}$, and the west half of the N. E. $\frac{1}{4}$ of Section 23.

That the 3281 $\frac{1}{2}$ acres at Sites referred to in said mutual written agreements were the same lands as are hereinbefore lastly described.

That the following is a more particular description by legal subdivisions of the Eureka Ranch :

In Township 16 North, Range 3 West, Mount Diablo Base and Meridian, all Sections 20, 21 and 29 ; the north half, and the north half of the south half of Section 28.

That on said 7th day of October, 1891, the said Edgar Mills did own the above lastly described lands, and did not own any other lands designated or known as the Eureka Ranch.

III.

That said Market Street lot was worth to the plaintiff as of said 7th day of October, 1891, and thereafter down to the date of the breach of the contract hereinafter alleged the sum of one hundred and sixty-five thousand dollars (\$165,000), and that said 8421 acres of land were

on said day of the value of one hundred and seventy-three thousand four hundred dollars (\$173,400).

IV.

That the plaintiff was able, ready and willing from October 7th, 1891, to and until November 18th, 1891, to sell and convey to said Edgar Mills said Market Street lot by a good and sufficient deed conveying to the said Edgar Mills a perfect title to said lot, but that on said November 18th, 1891, said Edgar Mills refused to buy said lot, or to accept a conveyance thereof, and refused to comply with, or carry out his said agreement to buy said lot as aforesaid, on the ground and for the reason that the title thereto was imperfect; that by reason of such refusal, the plaintiff suffered damages in the sum of one hundred and twenty-eight thousand four hundred dollars (\$128,400).

V.

That on the 10th day of January, 1893, the said Edgar Mills died in the City and County of San Francisco, leaving a will, whereof he named the defendants Executors; that on the 26th day of January, 1893, an order was duly made by the Superior Court of the City and County aforesaid, that being the Court having jurisdiction in the matter of the estate of Edgar Mills, deceased, admitting said will to probate and ordering letters testamentary to issue to the defendants. That thereafter defendants qualified as such executors and letters testamentary were issued to them out of said Court and defendants entered upon their duties as such executors, and

have been ever since and are now the duly qualified acting executors of the last will and testament of Edgar Mills, deceased.

That on the 26th day of January, 1893, an order was duly made by said Superior Court in the matter of the estate of Edgar Mills, deceased, ordering publication of notice to creditors, and that in accordance with such order the said executors did on the 30th day of January, 1893, publish for the first time a notice to the creditors of and all persons having claims against the said decedent to exhibit them within ten months after the first publication of said notice to said executors.

VI.

That on the 11th day of September, 1893, the plaintiff duly presented and exhibited to the defendants as such executors, at the place mentioned in said notice, his claim against the estate of said decedent for breach of contract as hereinbefore alleged for the sum of \$144,398 inclusive, being the principal sum of \$128,400, with interest from November 18th, 1891, for one year and ten months, which claim was accompanied by copies of the said written agreements and was supported by the affidavit of the plaintiff that the amount therein specified was justly due to him, that no payments had been made thereon which were not credited, and that there were no offsets to the same to the knowledge of said affiant, a copy of which said claim is hereto attached marked Exhibit A, and is hereby expressly referred to and made a part of this complaint. That on the 23d day of Septem-

bèr, 1893, said claim was by said defendants as such executors rejected in whole.

Wherefore, plaintiff prays judgment against the defendants for the sum of one hundred and twenty-eight thousand four hundred dollars, with interest thereon from the 18th day of November, 1891, and costs of suit.

VINCENT NEALE,
SIDNEY V. SMITH,
Attorneys for Plaintiff.

EXHIBIT A.

In the Superior Court, City and County of San Francisco, State of California, Dept. 10, Probate.

In the Matter of the Estate of }
Edgar Mills, Deceased. } Creditor's Sale.

Letters testamentary of the estate of Edgar Mills, deceased, having been granted to S. Prentiss Smith, Frank Miller and William P. Harrington, the undersigned, a creditor, presents his claim against the estate of said deceased, with the necessary vouchers of said executors for their approval, to wit:

Estate of Edgar Mills, Deceased,

To Albert E. Gray, Dr.

To damages for breach of agreement to buy real property under written contract, a copy of which appears below, date of breach November 18th, 1891. . . \$128,400

To interest on same from November 18th, 1891, to date,
1 year and 10 months. 16,498

\$144,898

On October 7th, 1891, Edgar Mills agreed in writing to buy from Albert E. Gray the following property situate in the City and County of San Francisco : Commencing at a point in the southeasterly line of Market Street distant two hundred and seventy-five (275) feet northeasterly from the point of intersection of the northeasterly line of Eighth (8th) Street, formerly Price Street, with the said southeasterly line of Market Street, thence northeasterly along the last mentioned line eighty-two feet and six inches, thence southeasterly and parallel with Eighth Street one hundred and sixty-five (165) feet to the northwesterly line of Stevenson Street, thence southwesterly along the last mentioned line eighty-two feet and six inches, thence northwesterly one hundred and sixty-five (165) feet to the place of beginning. Being a subdivision of lot No. 264 of the 100 vara lot survey, according to map of W. M. Eddy, on file in the office of the Recorder of said City and County.

The value of said property to said A. E. Gray on said day was \$165,000.

The consideration agreed to be paid by Edgar Mills for said San Francisco property was \$120,000 cash and 8421 acres of land more or less situate partly in Colusa and partly in Tehama Counties, California, of the value of \$173,400.

The said A. E. Gray agreed in writing to sell said San Francisco property to the said Edgar Mills, and was at all times ready and willing to do so, but on November 18th, 1891, said Edgar Mills refused to carry out his agreement.

Copy of contract above referred to.

September 16th, 1891.

To Albert E. Gray, Esq.,
405 California Street,
San Francisco.

Dear Sir :

Provided you take the following described property situate in Tehama and Colusa Counties as part payment up to one hundred and fifteen thousand dollars (\$115,000), I hereby make you an offer to purchase the lot situate on the south side of Market Street in this City extending through to Stevenson Street, lying on the east side of and adjoining Central Park and running east therefrom eighty-two and one half (82½) feet by a depth of one hundred and sixty-five (165) feet, at the price of two hundred and forty thousand dollars (\$240,000), namely :

In Cash.....	\$125,000
And in land as above.....	115,000
	<hr/>
	\$240,000

This offer to hold good for three weeks from this date to enable you to inspect my said lands. Said lands described over page.

Yours &c.,
(Signed) EDGAR MILLS.

(over page) IN COLUSA COUNTY.

My ranch near Colusa Junction, consisting of 2400 acres
known as "Eureka Ranch," at \$20.....\$ 48,000
Land at Sites consisting of 3281½ acres at \$5..... 16,400

IN TEHAMA COUNTY.

My ranch known as Ehorn Ranch, consisting of 1060 acres at \$30.....	31,800
Four hundred acres belonging to me close adjoining Kirkwood at \$20.....	8,000
And 1280 acres belonging to me a few miles west of Kirkwood at \$15.....	19,200
	\$115,400

Say 8421 acres at \$115,000.

My agent Mr. Houx will show you the above lands and give you sectional descriptions.

Yours, etc.,

(Signed) EDGAR MILLS.

October 6th, 1891.

Edgar Mills, Esq.,

Pacific Union Club,

San Francisco.

Dear Sir :—

Referring to your letter to me of the 16th September, 1891, wherein you say “ provided you take the following described property situate in Tehama and Colusa Counties as part payment up to one hundred and fifteen thousand dollars (\$115,000), I hereby make you an offer to purchase the lot situate on the south side of Market Street in this city, extending through to Stevenson Street, lying on the east side of and adjoining Central Park and running east therefrom eighty-two and one-half (82½) feet by a depth of one hundred and sixty-five (165) feet, at the price of two hundred and forty thousand dollars (\$240,000), namely :

In Cash.....	\$125,000
And in land as above....	115,000
	<hr/>
	\$240,000

“This offer to hold good for three weeks from this date to enable you to inspect my said lands thereafter described.”

I now and hereby accept your said offer in the said letter contained.

I am most respectfully,

(Signed) ALBERT E. GRAY.

SAN FRANCISCO, October 7th, 1891.

Dear Sir:—

I hereby accept the modification in the terms of your letter to me of the 16th September, 1891, now made by you, namely:

That you pay in cash one hundred and twenty thousand dollars	\$120,000
And in lands (as specified in your said letter).....	115,000
	<hr/>
	\$235,000

Yours respectfully,

(Signed) ALBERT E. GRAY.

To Edgar Mills,

Pacific Union Club,

San Francisco.

I hereby confirm the above and direct you to forward abstract of title to me or my attorneys, Messrs.

(Signed) EDGAR MILLS.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

Albert E. Gray, whose foregoing claim is herewith presented to the Executors of the estate of said deceased, being duly sworn, says that the amount thereof, to wit, the sum of \$144,898 with accruing interest at the rate of 7 per cent. per annum on the sum of \$128,400, is justly due to said claimant. That no payments have been made thereon which are not credited, and that there are no offsets to same to the knowledge of said claimant.

ALBERT E. GRAY.

Subscribed and sworn to before me, this 8th day of September, 1893.

(SEAL.)

D. A. CURTIN, Notary Public.

VINCENT NEALE,
SIDNEY V. SMITH,
Attorneys for Claimant.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

Albert E. Gray, being duly sworn, says that he is the plaintiff in the above entitled action; that he has read the foregoing Fourth Amended Complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

ALBERT E. GRAY.

Subscribed and sworn to before me, this 18th day of November, 1895.

(SEAL.)

D. A. CURTIN, Notary Public.

[Endorsed:] Service of a copy of the within Fourth Amended Complaint is hereby admitted this 19th day of November, 1895.

DENSON & DEHAVEN,
Attorneys for Defendants.

Filed November 19th, 1895. W. J. Costigan, Clerk.
By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Northern District of California, Ninth Circuit.

ALBERT E. GRAY,	Plaintiff,	}
<i>vs.</i>		
S. PRENTISS SMITH, FRANK	Executors	
MILLER and WILLIAM P.		
HARRINGTON,		
of the Last Will and Testa-		
ment of Edgar Mills, De-		
ceased,		
	Defendants.	

Answer to Fourth Amended Complaint.

Now come said defendants, and by leave of Court first had and obtained file and present this their answer to the Fourth Amended Complaint therein of said plaintiff and allege that they have no information or belief sufficient to enable them to answer the allegations of the said complaint that the said plaintiff was a subject of Victoria,

Queen of Great Britain and Ireland and Empress of India, an alien, and they therefore deny that at the commencement of this action, or that at any time since, the said plaintiff was or that he now is a subject of Victoria, Queen of Great Britain and Ireland and Empress of India, an alien, or that the said plaintiff was at any of said times or that he now is an alien.

Further answering the said fourth amended complaint, the said defendants deny that the alleged description set out in the said complaint of the land which the said plaintiff agreed to sell and convey to the said Edgar Mills a good and sufficient deed free from all incumbrances and which the said Edgar Mills agreed to buy from said plaintiff, is true and correct, and they allege that the true description of the said land and premises so agreed to be sold and conveyed and purchased is as follows, to wit : The lot of land situate on the south side of Market Street in the said City and County of San Francisco, extending through to Stevenson Street, lying on the east side of and adjoining Central Park, and running east therefrom eighty-two and one-half ($82\frac{1}{2}$) feet by a depth of one hundred and sixty-five (165) feet, and that the land so agreed to be sold and conveyed to the said Edgar Mills included not only the said Market Street lot, but also all the land lying between the southeasterly line of said Market Street lot as described in said complaint and the center of said Stevenson Street, subject, however, to the easement of the right of way in the public over said Stevenson Street ; that said defendants are informed and believe and therefore allege that said Stevenson Street

now is, and at all the times set out and referred to in the said complaint was, of a certain width, to wit, of the width of thirty-five (35) feet, and extended along and across the whole of the southeasterly end of the said Market Street lot.

Further answering the said complaint, said defendants deny that the said Market Street lot, or the land described and referred to in said contract of sale and purchase, was worth to the said plaintiff as of said seventh (7th) day of October, 1891, and thereafter down to the date of the alleged breach of the contract referred to in said complaint, or at any time in said complaint alleged or at any time, or at all, the sum of one hundred and sixty-five thousand dollars (\$165,000.00) or any other sum whatever; and the said defendants deny further that the lands of said Edgar Mills, described and alleged in the said complaint or described or referred to in said alleged agreements, were, on said day or at any other time, of the value of one hundred and seventy-three thousand four hundred dollars (\$173,400.00), or that they were on said day or at any time of any greater value than fifty-nine thousand and forty-five dollars (\$59,045.00).

Further answering, said defendants allege that they are informed and believe and therefore allege that said Edgar Mills did not at any time alleged or referred to in said fourth amended complaint, or at any time whatever, own any land known as or called "Mills' land, or lands at Sites," or "Land, or lands at Sites," and allege further that they are informed and believe and therefore allege that the land particularly described in said fourth

amended complaint by legal subdivisions and referred to in said fourth amended complaint as "certain lands at Sites containing 3281½ acres," was never at any time known or called by any such name, or designated as aforesaid, or as "Lands at Sites," and that if the words in said alleged contract referred to the said land so described by legal subdivisions, it was the first time that the same or any part thereof was so designated, and said defendants allege that on said seventh (7th) day of October, 1891, the said Edgar Mills did own other lands at Sites in said complaint referred to, and allege that on said day and at all the times in said complaint referred to, to and including the time of his death, said Edgar Mills owned a certain tract or body of land containing thirty-two hundred and eighty-one and one-half (3281½) acres of land situate in said Colusa County, in sections twenty-one (21), twenty-two (22), twenty-seven (27), twenty-eight (28), thirty-three (33) and thirty-four (34), in township seventeen (17) North, Range four (4) west, Mount Diablo Base and Meridian, and that at and during all of said times there was a certain town or village called Sites, which was situated within one mile of the western line of said tract of land hereinabove lastly referred to, while said town is about two miles from the nearest point and points of said land which in said complaint is referred to by legal subdivisions as Mills' lands at Sites, and they therefore deny that the 3281½ acres at Sites referred to in said alleged agreement were the same lands as are in said complaint described by legal subdivisions and therein alleged to be the same lands.

Further answering, said defendants allege that they are informed and believe that said plaintiff was not, and they therefore on their information and belief deny, that at the time alleged, or at any time whatever, said plaintiff was able, ready and willing, or that he was able, or ready to sell and convey, or to sell, or convey, to said Edgar Mills said Market Street lot by a good and sufficient, or good, or sufficient, or any, deed conveying to the said Edgar Mills a perfect, or any, title to said lot, or that said plaintiff at the time alleged, or at any time, was able, or ready to convey the said lot, or any title thereto whatever to said Mills ; and said defendants are informed and believe that the said Edgar Mills did not refuse, and they therefore deny that the said Edgar Mills on November 18, 1891, or at any other time whatever, refused to carry out his part of said alleged contract of sale and purchase either in whole or in part, or in any respect whatever, or that he refused to purchase the property so agreed by him to be purchased, or to accept a conveyance thereof made, or tendered under, or pursuant to, or in performance of, said alleged contract of sale and purchase, or that he refused to comply with, or to carry out his said alleged agreement to buy said lot as alleged, or at all ; and said defendants are informed and believe, and therefore allege that heretofore, to wit, on the eighteenth (18th) day of November, in the year 1891, there was tendered to said Edgar Mills by one Joseph Donohoe, and in his own behalf only, a deed executed by said Donohoe and his wife conveying to said Mills the said Market Street lot, and that said

tender was made solely on the condition that said Mills should then and there pay to said Donohoe the sum of \$165,000 cash, in gold coin of the United States, and should also assume and pay one-half of the taxes on said lot for the then current year ; that neither the said deed, nor any other deed for said lot was ever at any time tendered to said Mills on any other condition, or for, or on behalf of any other person whatever ; and they therefore deny that said Mills ever refused to accept a conveyance of said lot ; and said defendants are informed and believe that the said plaintiff did not suffer any damages, and they, therefore, deny that by the acts and omissions, or either of them, of the said Edgar Mills, alleged in said complaint, or that by any act or omission of the said Edgar Mills, or at all, the said plaintiff suffered damages in the sum of one hundred and twenty-eight thousand four hundred dollars (\$128,400.00), or in any other sum whatever, or at all.

Further answering, the said defendants allege that they are informed and believe, and they therefore allege that the said plaintiff on the said seventh day of October, in the year 1891, did not have, and that he never at any time whatever, either before or since said day, had any right, title, interest or estate whatever in or to, or possession of, the said Market Street lot or the land described and referred to in said contract of sale and purchase, or any part thereof, and that he never at any time whatever had any right or power to sell, or to convey, or to deliver the possession of, the same or any part thereof, or to make a contract to do so ; and that neither the

said plaintiff, nor any one else for him, ever tendered to the said Edgar Mills, or to any one for him, a good and sufficient or any deed whatever of or for said lot, or the land described and referred to in said contract of sale and purchase, or any part thereof.

Further answering, the said defendants allege that they are informed and believe, and they therefore allege that on the said seventh (7th) day of October, in the year 1891, and at the time of the entering into of the mutual written agreements between said plaintiff and said Edgar Mills alleged and referred to in the said complaint and continuously thereafter and to and until a day subsequent to the death of the said Edgar Mills, to wit, the twenty-eighth (28th) day of September, in the year 1892, one Joseph A. Donohoe was the owner seized in fee of all of the said Market Street lot set out and described in the said complaint, except an estate in fee after the termination of an estate for the life of one Mary Penniman in an undivided one-twelfth ($\frac{1}{12}$) part of that part of said Market Street lot lying on the northeasterly side thereof and which said part is of a uniform width of thirteen (13) feet and nine (9) inches by one hundred and sixty-five (165) feet in length and fronting on said Market Street and running back to the said Stevenson Street, and that at and during all of said times prior to a certain day, to wit, the twentieth (20th) day of July, in the year 1892, the said estate in said undivided one-twelfth ($\frac{1}{12}$) was owned by one Robert Penniman and one Walter Penniman, on which said last mentioned day the estate of said Robert and Walter was conveyed to the said

Joseph A. Donohoe ; that the remainder of the land described and referred to in said contract of sale and purchase, to wit, the part lying between the said southeasterly line of said Market Street lot and the center of said Stevenson Street, was during all of the times referred to or mentioned in said complaint owned in fee, subject to the easement of a right of way in the public as aforesaid, by some person or persons other than the said plaintiff, and who are and at all the times herein or in said complaint referred to have been unknown to these defendants or to any or to either of them.

For a further and separate answer said defendants allege that they are informed and believe and therefore aver that under and by virtue of the terms of the alleged contract set out and referred to in said fourth amended complaint, the said plaintiff herein was required to the said Edgar Mills an abstract of title to the land in San Francisco agreed to be sold and conveyed by said plaintiff to said Mills, that thereafter what purported to be an abstract of title to the said San Francisco land was supplied and handed to the said Edgar Mills and the said abstract was represented by the said plaintiff to the said Mills to be an abstract of the title to the said San Francisco land ; that said defendants are advised, informed, and believe, and therefore aver that said abstract of title showed that said plaintiff had no right, title or interest whatever in or to the said land in San Francisco, but on the contrary, so far as said abstract showed at all, that one Joseph A. Donohoe was the owner, seized in fee of all of the said land in San Francisco set out and described

in the said contract of purchase, except that part of the said land which lies between the southeasterly line of the lot described in said complaint as the Market Street lot and the center of Stevenson Street, and except further that said abstract left open and subject to question as to whether or not an interest in said property was not still vested in some undisclosed devisees of a former owner thereof, to wit, one William Martin, who was then dead and administration upon whose estate was then pending and unclosed and in which there was nothing to establish who were the children of one Mary Penniman and who under the terms of the will of said William Martin were entitled to share in the said property as devisees; and said defendants are informed and believe, and therefore aver that upon further investigation it was found and the said Edgar Mills was informed and believed that an estate in fee, after the termination of an estate for the life of one Mary Penniman in an undivided one-twelfth ($\frac{1}{12}$) part of that part of said land in San Francisco lying on the northeasterly side thereof and which said part is and was of a uniform width of thirteen (13) feet and nine (9) inches by one hundred and sixty-five (165) feet in length and fronting on said Market Street and running back to said Stevenson Street, was then owned by one Robert Penniman and one Walter Penniman, and said defendants are informed and believe, and therefore aver the ownership of the said San Francisco land continued to be as hereinabove set out during all of the times referred to in said complaint prior to a certain day, to wit, the twentieth (20th) day of July, in the year 1892,

on which said day the estate of said Robert and Walter Penniman was granted and conveyed to the said Joseph A. Donohoe; and said defendants are informed and believe and therefore aver that upon the investigation as aforesaid of the title to the said San Francisco property and the disclosure of its condition as aforesaid it was agreed and conceded by all of the parties to and by all of the parties in any way interested in said contract of sale and purchase that the title to the said San Francisco property was not good and could not be granted or conveyed by the said plaintiff to the said Edgar Mills, and thereupon, to wit, on the twenty-seventh (27th) day of October, in the year 1891, the said contract of sale and purchase was abandoned and rescinded by the consent of all the parties thereto and that never at any time thereafter during the lifetime of the said Edgar Mills did the said plaintiff make any claim thereon or thereunder, upon or against the said Edgar Mills, or ask that the same be enforced or further carried out in any way or manner whatever, and that therefore the said plaintiff should not be heard to make or maintain any claim on or under the said contract, or be permitted to seek in any manner to enforce the same :

Wherefore, said defendants demand judgment against the said plaintiff that he take nothing and that they do have and recover of the said plaintiff their costs in this behalf incurred.

DENSON & DEHAVEN,
Attorneys for Defendants.

RICHD. BAYNE,
Of Counsel.

STATE OF CALIFORNIA, }
 City and County of San Francisco. } ss.

S. Prentiss Smith, being first duly sworn, deposes and says: That he is one of the defendants referred to in the foregoing answer; that he has read said answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

S. PRENTISS SMITH,

Subscribed and sworn to before me, this 23d day of November, in the year 1895.

(SEAL.) JAMES MASON,
 Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed:] Answer to Fourth Amended Complaint.
 Due service of copy of the within on us is hereby admitted this November 25th, 1895.

VINCENT NEALE,
 SIDNEY V. SMITH,
 Attorneys for Plaintiff.

Filed November 25th, 1895, as of November 19th, 1895, by order of Court pursuant to stipulation of parties.
 W. J. Costigan, Clerk.

No. 11,878.

In the United States Circuit Court, Ninth Judicial District, Northern District of California.

ALBERT E. GRAY,	} Plaintiff,	
<i>vs.</i>		
S. PRENTISS SMITH and others,		} Defendants.
Executors, etc.,		

Findings of Fact and Conclusions of Law.

From the evidence adduced upon the trial of this cause I find the following facts :

I.

On the 16th day of September, A. D. 1891, Edgar Mills, the decedent named in plaintiff's complaint herein and the testator under whose will the defendants are acting as executors, executed and delivered unto Albert E. Gray, the plaintiff herein, a document which was and is in the words and figures following :

“ 16 SEPT., 1891.

“ To Albert E. Gray, Esq.,

“ 405 California Street, San Francisco.

“ Dear Sir :—

“ Provided you take the following described property, situate in Tehama and Colusa Counties, as part payment up to one hundred and fifteen thousand dollars (\$115,000), I hereby make you an offer to purchase the lot

situate on the south side of Market Street in this city, extending through to Stevenson Street, lying on the east side of and adjoining Central Park and running east therefrom eighty-two and one-half feet ($82\frac{1}{2}$ feet) by a depth of one hundred and sixty-five feet (165 feet), at the price of two hundred and forty thousand dollars (\$240,000), namely :

In Cash.....	\$125,000
And in land as above.....	115 000
	<hr/>
	\$240,000

This offer to hold good for three weeks from this date to enable you to inspect my said lands. Said lands described over page.

“ Yours, etc.,

“ EDGAR MILLS.”

The following appears on back of above letter :

“ IN COLUSA COUNTY.

My ranch near Colusa Junction, consisting of 2400 acres, known as Eureka Ranch, at \$20.00.....	\$ 48,000
Land at Sites consisting of $3281\frac{1}{2}$ acres at \$5.00.....	16,400

“ IN TEHAMA COUNTY.

My ranch known as Ehorn Ranch, consisting of 1060 acres, at 30.....	31,800
Four hundred acres belonging to me close adjoining Kirkwood, at 20.....	8,000
And 1280 acres belonging to me a few miles west of Kirkwood, at 15.....	19,200

\$115,400

Say 8421 at \$115,000.

“ My agent, Mr. Houx, will show you the above lands and give you sectional descriptions.

“ Yours, etc.,

“ EDGAR MILLS.”

II.

On the 6th day of October, A. D. 1891, the plaintiff executed and delivered unto the said Edgar Mills a document which was and is in the words and figures following, to wit :

“ SAN FRANCISCO, October 6th, 1891.

“ Edgar Mills, Esq.,

“ Pacific Union Club, San Francisco.

“ Dear Sir :—

“ Referring to your letter to me of the 16th September, 1891, wherein you say : ‘ Provided you take the following described property situate in Tehama and Colusa Counties as part payment up to one hundred and fifteen thousand dollars (\$115,000), I hereby make you an offer to purchase the lot situate on the south side of Market Street, in this City, extending through to Stevenson Street, lying on the east side of and adjoining Central Park, and running east therefrom eighty-two and one-half feet (82½ feet) by a depth of one hundred and sixty-five feet (165 feet), at the price of two hundred and forty thousand dollars (\$240,000), namely :

In Cash.....	\$125,000
And in land as above.....	115,000
	<hr/>
	\$240,000

“ ‘ This offer to hold good for three weeks from this

date to enable you to inspect my said lands, thereafter described, I now and hereby accept your said offer in the said letter contained.

“I am, most respectfully,

“ALBERT E. GRAY.”

III.

And on the 7th day of October, A. D. 1891, the said Edgar Mills and the plaintiff herein executed and delivered a certain document, which was and is in the words and figures following, to wit:

“SAN FRANCISCO, Oct. 7th, 1891.

“Dear Sir:—

“I hereby accept the modification in the terms of your letter to me of the 16th September, 1891, now made by you, namely, that you pay,

In cash, one hundred and twenty thousand dollars.	\$ 120,000
And in land (as specified in your said letter).....	115,000
	<hr/>
	\$235,000

“Yours respectfully,

“ALBERT E. GRAY.

“To Edgar Mills, Esq.,

“Union Pacific Club, San Francisco.”

“I hereby confirm the above and direct you to forward abstract of title to me or my attorney herein.

“EDGAR MILLS.”

The property referred to by the said several documents as situated on the south side of Market Street, etc., was and is properly described as follows:

“ Commencing at a point on the southeasterly line of Market Street distant thereon 275 feet northeasterly from the point of intersection of the northeasterly line of Eighth Street, formerly Price Street, with the said southeasterly line of Market Street; running thence northeasterly along said last mentioned line 82 feet 6 inches; thence southeasterly parallel with Eighth Street 165 feet to the northwesterly line of Stevenson Street; thence southwesterly along said last named line 82 feet 6 inches, and thence northwesterly 165 feet to the place of beginning.”

IV.

The title to said Market Street lot was from a date prior to the commencement of the negotiations between plaintiff and Edgar Mills until some time in the year 1892, vested in Jos. A. Donohoe, Sr.

On the 4th day of September, A. D. 1891, a paper writing was executed by one J. H. Cavanagh and Albert E. Gray, the plaintiff herein, which was and is in the words and figures following, to wit:

“ SEPT. 4, 1891.

“ To Albert E. Gray,

“ Dear Sir:—

“ With reference to the Market Street property between 7th and 8th Streets having a frontage of 87½ feet on Market, extending through to Stevenson Street in the rear, which I have for sale, being at present the property of Joseph Donohoe, it is understood and agreed between us that we divide equally between us the com-

mission payable on the sale thereof or the net excess between the selling price and the price your customer (or buyer introduced through your efforts) may give in cash or partly in cash and part in real estate exchange.

“ J. H. CAVANAGH.

“ ALBERT E. GRAY.”

V.

On the 7th day of October, A. D. 1891, the plaintiff herein and the said Cavanagh executed a paper writing, which was and is in the words and figures following, to wit :

“ SAN FRANCISCO, Oct. 7th, 1891.

“ To J. H. Cavanagh,

“ Dear Sir :—

“ With reference to my contract with Mr. Edgar Mills wherein he agrees to purchase Mr. Donohoe’s property on the south side of Market Street, having a frontage of eighty-two and a-half feet by one hundred and sixty-five feet between Seventh and Eighth Streets, as appears in his letter of contract of the sixteenth of September last, I hereby acknowledge that you hold an equal interest with myself in said contract. The lands mentioned in said contract to be granted and conveyed to us as tenants in common ; and I hereby authorize you to act for us both in your negotiations with Mr. Donohoe. I have duly accepted Mr. Edgar Mills’ letter of contract of the 16th ulto. as above.

“ Yours truly,

“ Approved :

“ ALBERT E. GRAY.

“ J. H. CAVANAGH.”

VI.

That on the 18th day of September, 1891, one J. H. Cavanagh made a written offer to said Donohoe for the purchase of said Market Street property, which written offer was in the words and figures following :

“ SAN FRANCISCO, Sepr. 18th, 1891.

“ Joseph A. Donohoe, Esq.,

“ San Francisco.

“ Dear Sir :

“ Regarding sale of your property, 82½x165 feet between 7th and 8th Streets, I hereby offer you firm \$160,000.00 cash. I cannot wait for letter, and as I stated to you to-day must have answer by cable as I have only a limited time and wish to reiterate what I said to you to-day. This is a good price for the property simply because I can get you better property for less money. Please let me hear from you at your earliest convenience and much oblige,

“ Very truly,

“ J. H. CAVANAGH.”

That said offer in writing was delivered by said Cavanagh to one Joseph A. Donohoe, Jr., who was the son and agent of Joseph A. Donohoe, Sr. That said Joseph A. Donohoe, Sr., was absent from the State of California. That said Joseph A. Donohoe, Jr., reported the fact of said offer to his father, who in writing signed by him authorized his said son to sell said land for one hundred and sixty-five thousand (\$165,000) dollars and for one-half the taxes of the current year.

That said Donohoe, Jr., did not know anything of the resources or responsibility of the said Cavanagh, and therefore would not enter into a contract to sell to him or whereby Cavanagh might go upon the street and seek a purchaser, but demanded to know of said Cavanagh the name of the proposed purchaser, and was thereupon given the name of Edgar Mills. The said Donohoe, Jr., as agent of Donohoe, Sr., then executed a paper, which he placed in an envelope addressed to J. H. Cavanagh and delivered to him the document which was and is as follows :

“SAN FRANCISCO, October 7th, 1891.

“I hereby agree to sell my lot $82\frac{6}{12}$ feet on south side of Market Street, immediately east and adjoining the Central Park between 7th and 8th Streets and running through to Stevenson Street in the rear, to Edgar Mills for one hundred and sixty-five thousand dollars U. S. gold coin (\$165,000), payable on delivery of deed after examination of title, say fifteen days from date. The purchaser to pay half of the taxes for the current year.

“JOS. A. DONOHOE, JR.,

“per J. A. DONOHOE, JR.”

That the signatures to said instrument were intended for and meant Joseph A. Donohoe, Sr., per Joseph A. Donohoe, Jr.

On the 8th day of October, 1891, said Edgar Mills was first informed that the said Market Street lot in San Francisco belonged to the said Joseph A. Donohoe, Sr., and was at the same time informed of the execution by

said Joseph A. Donohoe, Sr., of the said written offer upon the part of said Donohoe, Sr., to sell to him, the said Edgar Mills, the said Market Street lot, and which offer was dated on October 7th, 1891, and is hereinabove set out in this finding in full.

VII.

On the 28th day of December, A. D. 1891, the said J. H. Cavanagh executed and delivered unto his wife, Amelia Cavanagh, a certain document, which was and is in the words and figures following, to wit :

“ 707½ Larkin Street, San Francisco.

“ December 28, 1891.

“ In consideration of the love and affection I bear my dear wife Amelia, I hereby assign to her the contract between myself and Joseph A. Donohoe dated October 7th, 1891, whereby he agrees to sell to my nominee, Mr. Edgar Mills, his lot 82½ feet on south side of Market Street for \$165,000 (a copy of which contract is hereunto annexed marked “ A ”), and all my right, title, interest, benefit, claim and demand therein or thereunder to hold unto my said wife, her heirs, executors, administrators and assigns, absolutely and for her own sole use and benefit.

“ J. H. CAVANAGH.

“ Witnesses to the signing hereof by said J. H. Cavanagh :

“ MAX BLUM, 709 Larkin Street.

“ JOE A. PATTERSON, 707½ Larkin St., San Francisco.”

VIII.

And on the 4th day of September, A. D. 1893, the said Amelia Cavanagh executed and delivered to the plaintiff herein a certain instrument in writing, of which the following is a true copy, to wit :

“ I, Amelia Cavanagh, formerly the wife and now the widow of J. H. Cavanagh, deceased, formerly of San Francisco, do hereby for value received assign, transfer and set over to Albert E. Gray, of Lasata Ranch, near Oroville, all my interest, claim and demand against the estate of Edgar Mills, deceased, for damages for breach of contract by said Edgar Mills, deceased, dated October 7th, 1891, for the purchase of the lot formerly owned by Joseph A. Donohoe on Market Street near Central Park.

“ In witness whereof, I have hereunto set my hand and seal this 4th day of September, 1893.

“ A. CAVANAGH (Seal).

“ Signed, sealed and delivered by the above named Amelia Cavanagh in the presence of J. Whiteside, driver for Wilson’s Stable, Raymond.”

IX.

That said Edgar Mills never accepted the proposition contained in the said document executed by Joseph A. Donohoe, Sr., under date of October 7th, 1891, and neither said Mills nor said Cavanagh, nor said Gray ever complied or offered to comply with the terms of said offer. The plaintiff had no right, title or interest of, in or

to the said Market Street lot, save such as he may have gained by or through the several documents hereinbefore in these findings set out by copy, and no contract existed between plaintiff and defendants' testator for the purchase of said Market Street lot or otherwise, except as contained in the foregoing several documents set out in findings I, II and III.

X.

The lands mentioned in the said letter from Edgar Mills to plaintiff dated September 16th, 1891, and set out in finding number I herein, are the same as the lands in Colusa and Tehama Counties, State of California, described in the second paragraph of the fourth amended complaint herein.

XI.

Plaintiff never paid or offered to pay to said Joseph A. Donohoe, Sr., the purchase price demanded by the said Donohoe for the said Market Street lot, and did not at any time have the means or ability to pay the said Donohoe the purchase price demanded by him for the said Market Street lot, and plaintiff never took any steps to procure for the said Edgar Mills the title to the said Market Street lot other than by procuring the written offer of said Donohoe dated October 7th, 1891, which offer is fully set out in finding number VI.

On the 23d day of November, A. D. 1891, the said Jos. A. Donohoe, Sr., executed three several deeds of said Market Street lot, one to Edgar Mills, one to J. H. Cavanagh and one to the plaintiff Albert E. Gray, and

tendered the same to the said several grantees respectively, and demanded of each of them the payment of the said sum of \$165,000.00 in gold coin, and one-half of the current year's taxes, and each of said grantees refused to accept such deed or to pay the said purchase price demanded. The said deeds were tendered and said price demanded by said Jos. A. Donohoe, Sr., under the advice of his counsel, for the sole purpose of cutting off and determining any supposed or possible right on behalf of said Mills, Cavanagh and Gray, or either or any of them, in or to said Market Street lot growing out of the written offer made by him under date of October 7th, 1891, and set out by copy in finding No. VI above, and to free his said Market Street lot from any equities on the part of any of said persons, and so that he might sell said lot with an unquestioned title to another purchaser.

XII.

That after the execution by the said Joseph A. Donohoe, Sr., of said document of October 7th, 1891, the said Donohoe delivered an abstract of title of said Market Street lot to the attorneys of the said Mills, Messrs. Jarboe and Jarboe, who after examination thereof, on October 23d, 1891, wrote, signed and delivered to said Mills the following letter :

“ SAN FRANCISCO, October 23d, 1891.

“ Edgar Mills, Esq.,

“ Dear Sir :—

“ As soon as we had completed the examination of

that part of the abstract furnished us for the Market Street purchase, we sent it to our searcher for continuation, with a special reference to certain defects that were disclosed by the original abstract.

“The defects disclosed by the abstract, as Mr. Paul Jarboe explained to you, are as follows :

“The title comes through two different deraignments, one including the westerly sixty-eight feet and nine inches, and the other the easterly thirteen feet and nine inches.

“The title to the sixty-eight feet and nine inches seemed to us to be good on the original examination ; but the title to the thirteen feet and nine inches seemed to be bad for this reason : a deed was made to a woman named Margaret Martin in the lifetime of her husband, purporting to convey the property to her ; but, from the manner in which the deed was drawn, it gave the title presumptively to her husband instead of to herself, and made it necessary to get a deed either from her husband or through his estate.

“A probate proceeding was commenced on the estate of William Martin, which, if it had been carried out, would probably have revoked the defect ; but that estate is still pending in the Probate Court and undisposed of and undistributed.

“Mr. Hyde, or other grantors of Mr. Donohoe, seem to have found this difficulty out themselves, and have gotten in deeds from a number of persons claiming to be heirs of William Martin, but, as the Probate record is silent on this subject, there is no evidence as to who

were the heirs of William Martin, whether they were adults or minors, whether the creditors have been paid, or whether all the heirs have united in the deeds.

“We called the attention of Mr. Donohoe, Jr., to this matter on Tuesday, and asked him to look among his papers and see if he could find any opinion of his attorney on the subject, or any documents throwing light on the subject.

“On the same day he returned, giving us merely one deed. He, himself, knew nothing of the difficulty, but seems to think the title was reported to his father as perfect.

“He, however, referred us to Mr. Galpin, who is now doing business for his father.

“We saw Mr. Galpin this morning and explained to him the difficulty and he has taken the abstract and promised to see us again during the day upon the subject.

“Of course, having reported a defective title, under the rule of law we have complied with your obligation as to the fifteen days, and time does not run against you now until the vendor is able to remove our objections and our report was made to Mr. Donohoe long within the necessary time.

“Under the law as it now stands, the wife has to join in a conveyance of the community property of her husband.

“Mr. Donohoe, Jr., has a power of attorney from his father, but none from his mother. If the sale goes through, the parties will have to sign the deeds themselves.

“Mr. Donohoe suggested, the other day, that a deed should be prepared and sent to New York for execution, but we have not seen fit to follow this course, because we do not wish to be deemed to admit that the title is a good one.

“As soon as Mr. Galpin reports to us we will make a further report to you, and hope that that will be during the course of the afternoon.

“Your rights are in no way prejudiced, as above written, on account of the fact that we have reported on the title within time.

“Yours very truly,

“JARBOE & JARBOE.”

On the 27th day of October, in the year 1891, Jarboe & Jarboe wrote, signed and delivered to said Mills the following letter :

“SAN FRANCISCO, Oct. 27, 1891.

“Edgar Mills, Esq.

“Dear Sir :—

“We have just seen Mr. Galpin, to whom we were referred by Mr. Donohoe, in regard to the piece of property on Market Street.

“They admit that our objection is well taken, and suggest a plan for straightening the title which will take at the shortest 60 days. It will probably be somewhat longer than this, however.

“They are willing to adopt any methods of correction which we may submit to them, but the defects are such that it will hardly be possible to cure them in much shorter time than 60 days.

“Waiting to hear your wishes upon the subject before proceeding further with the matter, we are

“Very respectfully yours,

“JARBOE & JARBOE.”

Subsequently and prior to November 18th, 1891, the said Jarboe & Jarboe rejected the title to the Market Street lot and reported to said Mills that said title was fatally defective, and thereupon the attorneys of said Mills reported to Mr. Gray, the plaintiff, as follows: That they had reported to him, Mills, a fatal defect in the title, in consequence of which said Mills had definitely decided not to “assume” the purchase, and had given notice to said Donohoe, Sr., to that effect, whereupon plaintiff expressed his surprise and said he would see Mr. Donohoe, Sr., about the matter. The said title was not in reality defective, and the said Donohoe had a good, marketable, sufficient and clear title, deducible of record, to said Market Street lot, although at the time when the said Mills objected to such title said Donohoe and his attorneys conceded that the objections thereto made by the attorneys for said Mills were valid, and that said title was in fact defective.

XIII.

The plaintiff herein has not suffered loss or damage through or by any act or omission of the said Edgar Mills as alleged in plaintiff’s fourth amended complaint herein or otherwise, in the sum of one hundred and twenty-eight thousand four hundred (\$128,400) dollars, or in any sum whatever.

XIV.

It is not true that on the 27th day of October, A. D. 1891, or at any other time, the contract of sale and purchase made between plaintiff and the said Edgar Mills was abandoned or rescinded by the consent of all the parties thereto.

And as conclusions of law from the foregoing facts the Court decides :

1st. That said plaintiff was never at any time able or ready to convey, or cause to be conveyed, to the said Edgar Mills the said Market Street lot according to the terms of the contract set out in the complaint.

2nd. That the plaintiff has suffered no damage, and is not entitled to any relief in this case.

3rd. That the defendants are entitled to judgment for costs.

Let judgment be so entered.

JOSEPH McKENNA,
Judge.

[Endorsed:] Filed September 16th, 1896. W. J. Costigan, Clerk. By W. B. Beazley, Deputy Clerk.

*In the Circuit Court of the United States, Northern
District of California, Ninth Circuit.*

ALBERT E. GRAY,

Plaintiff,

vs.

S. PRENTISS SMITH, FRANK
MILLER and WILLIAM P.
HARRINGTON, Executors of
the last Will and Testament of
Edgar Mills, Deceased,
Defendants.

Bill of Exceptions.

Be it remembered that on the 16th day of September, 1896, the Court rendered its decision in the above entitled action in the words and figures following :

(Here follows true copy of findings.)

Evidence, both oral and documentary, was introduced by and on behalf of the respective parties to the said action upon the issues raised by the pleadings therein, and, among others, the following :

WILLIAM MINTO was a witness called and sworn on behalf of the plaintiff, and testified that his business was that of a surveyor—civil engineer ; that it was such in the year 1891 ; that he was employed a greater part of the time in reporting on land values ; that he so reported for the Savings Union and State University, and for in-

dividuals ; that he had been in that business about ten (10) years ; that in the fall of 1891 he visited, for the purpose of appraising and making a report thereon, the lands referred to and described in the complaint in said action ; that he took with him a Mr. Houx, who was farming a part of Mr. Mills' lands in the same neighborhood ; that he examined the said lands and appraised the values of the same, and stated his valuation of the particular tracts, and also testified that he made the said examination and appraisal by the instructions or orders of the Savings Union.

JOS. A. DONOHOE, JR., was also a witness who was called and testified on behalf of the said plaintiff (among other) as follows : testified that the reason why he, witness, made the memorandum of date October 7th, 1891, executed by him on behalf of his father offering to sell the property referred to in the complaint as the Market Street lot, for \$165,000 and half the taxes, run on its face in favor of Edgar Mills, although Cavanagh had made the offer to buy the said property, was that he, witness, did not know Cavanagh ; did not know anything about him, or anything about his resources, and that he, witness, would not have given him, Cavanagh, that piece of land for sale at that time, and give Cavanagh a line on it, and have him take it out on the street ; that he, witness, preferred to be the judge of who was buying it, and insert that name in ; that in other words, it was a sale to Edgar Mills, or nobody ; that he, witness, asked him, Cavanagh, for the name of the purchaser which he, witness, inserted in that agreement purposely ; that as he,

witness, said before, he would not have given Mr. Cavanagh a line on that lot without having some reservation of that kind; that after he, Cavanagh, told witness Mr. Mills, witness made some remark that he, Mills, was a very old friend of his father, and that after some further conversation Cavanagh said: "I am not dealing with Mr. Mills; it is a friend of mine;" that witness asked him who it was, and he said a Mr. Gray, and he offered to bring him in and introduce him; that witness thought one broker was enough at the time, and asked Cavanagh to produce some authority or some agreement between Mr. Mills and Gray, to show that they were working in conjunction; and that Cavanagh went out and brought in some letter, the contents of which witness did not remember.

Further, that witness was not informed by Cavanagh that Mills was buying this property (the Market Street lot) from Mr. Gray, so far as he could recall; that Cavanagh made witness a written offer, which witness submitted to his father and got his confirmation or authority to sell for a certain price by cable; that witness told Cavanagh that he would not sell to him, and when Cavanagh asked for a written agreement witness asked him the name of his principal, and he said Edgar Mills, and then witness put it in that paper; that witness only handed him, Cavanagh, that paper (to wit, the memorandum of October 7th) after Cavanagh assured witness by some writing that he was working in conjunction with Mr. Gray.

OLIVER ELLSWORTH was also called and was sworn,

and testified on behalf of said plaintiff (among other) as follows: That on the 24th day of November, in the year 1891, he tendered to the said Cavanagh and to the said plaintiff respectively, deeds executed to them severally by the said Donohoe, Sr., and his wife, and conveying said Market Street lot, and demanded of the said grantees in the said respective deeds the payment of the consideration therein set out, to wit, \$165,000; and that each of said respective grantees refused to pay the said consideration, and that in consequence neither of said deeds was ever delivered to either of said grantees.

The said several tenders of said respective deeds was shown by the evidence to have been made by the said Ellsworth on behalf of and under authority from the said Jos. A. Donohoe, Sr., and not otherwise.

There was no other evidence upon the issue as to the ability of plaintiff to pay Jos. A. Donohoe, Sr., for his Market Street lot.

In the printed argument signed and presented herein by the attorneys for the plaintiff on his behalf, among other, are the following paragraphs: * * * "Upon this payment and conveyance by Mills to Gray depended Gray's ability to produce Donohoe's deed, depended so utterly and wholly that Mills' refusal to go amounted to an absolute prevention of Gray's performance. Every fact in the case points to the moral conviction that if Mills had lived up to his contract by paying his \$120,000.00 and conveying to Gray the country lands, Gray would have been abundantly able to carry out his part of the compact. Herein lay Gray's ability: in the anxious

readiness of Donohoe to live up to his engagement, in the fact that Mills' land and money, which under the contract belonged equitably and potentially to Gray, would have enabled him to pay Donohoe and procure the deed. * * * Morally, we know that if Mills had not retired the transaction would have gone smoothly through, and that Mills' conduct was the sole cause of its defeat. Morally, we know that Gray could not fulfill his engagement unless Mills on his part fulfilled the obligations arising from his acceptance of the benefits of the transaction and his knowledge of the facts."

There was no evidence whatever that plaintiff could have procured a loan for any amount whatever, even had he owned Mills' country lands, or had the same been conveyed to him.

There was no evidence whatever that plaintiff had any financial ability, or that it would have been possible for him to have raised an amount sufficient to pay the price asked by Donohoe for the Market Street lot, or that he had completed any arrangement to procure a loan for any amount whatever upon the lands which, under the contract alleged in the complaint, Mills was to convey to him in exchange for the Market Street lot.

THE PLAINTIFF NOW EXCEPTS to the decision of the Court that the plaintiff did not at any time have the means or ability to pay Joseph A. Donohoe, Sr., the purchase price demanded by him for the Market Street lot, and as grounds of said exception states that said finding was not supported by the evidence.

And because the foregoing does not appear of record, the plaintiff has in due time prepared and served on defendant this his bill of exceptions, and asks that the same may be settled and allowed by the Court.

The foregoing bill of exceptions is allowed.

Dated October 30th, 1896.

JOSEPH McKENNA, Judge.

[Endorsed:] Filed October 30th, 1896. W. J. Costigan, Clerk.

Petition for Writ of Error, filed February 12, 1897.

Assignment of Errors, filed February 12, 1897.

Order allowing Writ of Error, filed February 12, 1897.

Bond approved, filed February 12, 1897.

Certificate to Transcript, certified March 9, 1897.

Writ of Error and Answer thereto, filed February 12, 1897.

Citation, filed February 12, 1897.

